

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CITY OF KANSAS CITY MO AVIATION DEPARTMENT,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

DOCKET NUMBER WD71019

Date: February 9, 2010

Appeal from:
Administrative Hearing Commission

Appellate Judges:
Division One: Lisa White Hardwick, Presiding Judge, James M. Smart, Jr. and Alok Ahuja, Judges

Attorneys:
James R. Layton, Esq. and Jeremiah Morgan, Esq., Jefferson City, MO, for appellant.

Mark W. Comley, Esq., Jefferson City, MO and Melody L. Cockrell, Esq., Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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v.

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WD71019

ADMINISTRATIVE HEARING COMMISSION

Before Division One Judges: Lisa White Hardwick, Presiding Judge, James M. Smart, Jr. and Alok Ahuja, Judges

Pursuant to its Charter, the City of Kansas City, Missouri, owns, and through its Aviation Department manages, the Charles B. Wheeler Downtown Airport. It leases facilities at the Airport to a variety of tenants.

The facilities leased by certain Airport tenants are supplied with electricity purchased by the City from Kansas City Power & Light Company ("KCP&L"). The City separately meters the electricity usage of some of these tenants and bills those tenants on a monthly basis, based on their metered electricity usage.

As to those tenants receiving separately-metered City-supplied electricity, the City reported the amounts collected from these tenants for their electricity usage as taxable prior to August 2007. The City stopped paying sales tax on the sale of this electricity in August 2007, however. In response, the Director issued sales tax assessments to the City for the months of August, September, and October 2007.

The City appealed the Director's assessments. On April 22, 2009, the Commission issued a Decision finding that the City was not liable for sales tax on electricity provided by the City to the separately-metered tenants based on the Commission's conclusion that "the City is not engaged in the business of selling electricity" within the meaning of §§ 144.010 and 144.020. The Director now appeals.

APPEAL TRANSFERRED.

Division One holds:

We conclude that resolution of this appeal requires construction of the State's revenue laws, which is within the exclusive appellate jurisdiction of the Missouri Supreme Court under article V, § 3 of the Missouri Constitution. We accordingly order the case to be transferred to the Supreme Court. Mo. Const. art. V, § 11.

Neither party disputes that this case involves "the revenue laws of this state"; the only question is whether we would be required to "construe" those revenue laws to decide this appeal. Prior cases have distinguished between cases involving the *construction* of a revenue law, which is within the Supreme Court's exclusive jurisdiction, versus those requiring only the *application* of a revenue law, which the Court of Appeals may properly decide. To distinguish cases requiring "construction" from those involving mere "application," the decisive factor is whether the Supreme Court has previously addressed the relevant legal issue.

Here, the Director argues that jurisdiction properly lies in this Court because two prior Supreme Court decisions establish the erroneousess of the Commission's Decision: *City of Springfield v. Director of Revenue*, 659 S.W.2d 782 (Mo. banc 1983); and *St. Louis Country Club v. Administrative Hearing Commission of Missouri*, 657 S.W.2d 614 (Mo. banc 1983). While *City of Springfield* and *St. Louis Country Club* undoubtedly establish principles which are highly relevant to the resolution of the issues presented by this appeal, the Commission's decision relies, at least in part, on circumstances absent in those earlier cases, in particular that the City supplies electricity solely to persons with whom it is in a landlord-tenant relationship, in order to further its interest in leasing the Airport facilities (transactions which are not themselves taxable).

These considerations sufficiently distinguish this case from *City of Springfield* and *St. Louis Country Club* that we would be compelled to go beyond merely applying existing Supreme Court precedent in order to resolve this appeal. Accordingly, this case is ordered transferred to the Supreme Court of Missouri pursuant to article V, § 11 of the Missouri Constitution.

Opinion by: Alok Ahuja, Judge

February 9, 2010

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